

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOB R. GILLEY and U.S. POSTAL SERVICE,
POST OFFICE, Aurora, IL

*Docket No. 98-2515; Submitted on the Record;
Issued March 22, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to compensation for the period May 12 to November 12, 1994; (2) whether the Office properly determined that appellant received a \$12,983.04 overpayment of compensation for the period May 12 to November 12, 1994; and (3) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

The Board finds that the Office properly determined that appellant was not entitled to \$12,983.04 in compensation for the period May 12 to November 12, 1994.

In the present case, the Office accepted that on November 22, 1976 appellant, then a 36-year-old mail carrier, sustained an employment-related lumbosacral strain and a permanent aggravation of a preexisting low back condition. Appellant received compensation for periods of disability. By decision dated November 29, 1994, the Office terminated appellant's compensation effective May 12, 1994. The Office indicated that it had been advised on May 12, 1994 that appellant had pled guilty to five counts of mail fraud under 18 U.S.C. § 1341 for defrauding the Federal Employees' Compensation Act¹ program. The Office noted that section 102 of Public Law 103-112 (107 Stat. 1089, October 21, 1993) expressly prohibited it from expending moneys "for payment of compensation benefits and expenses to any individual convicted ... of any felony fraud related to the application of or receipt of benefits" under the Act.

By letter dated February 12, 1998, the Office advised appellant that it had made a preliminary determination that he received a \$12,983.04 overpayment of compensation for the period May 12 to November 12, 1994. The Office indicated that it had also made a preliminary determination that appellant was at fault in the creation of the overpayment; the Office noted that by pleading guilty to defrauding the FECA program, appellant demonstrated that he accepted a payment he knew he was not entitled to. By decision dated July 13, 1998, the Office finalized its

¹ 5 U.S.C. §§ 8101-8193.

preliminary overpayment determination. The Office found that appellant received a \$12,983.04 overpayment of compensation for the period May 12 to November 12, 1994 and that he was at fault in the creation of the overpayment such that the overpayment was not subject to waiver.²

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ In this case, the Office relied on Pub. L. No. 103-112, § 102, 107 Stat. 1089, enacted on October 21, 1993 (for convictions between October 21, 1993 and September 30, 1994), which prohibits the Office from paying benefits to "any individual convicted of a violation of 18 U.S.C. § 1920, or of any felony fraud related to the application for or receipt of benefits" under the Act.⁴

The Office's procedure manual states that in support of termination or suspension of compensation the record must contain copies of the indictment or information, the plea agreement, if any, the document containing the guilty verdict and/or the court's docket sheet. Further, this evidence must establish: (1) the individual was convicted; and (2) the conviction is related to the claim for, or receipt of, compensation benefits under the Act.⁵ The termination is effective on the date of the verdict or on the date the guilty plea is made in open court.⁶ Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.⁷

On February 3, 1994 appellant pled guilty in federal court to five counts of violating 18 U.S.C. § 1341, a felony offense of mail fraud, for the purpose of obtaining compensation under the Act and on May 12, 1994 a judgment was imposed in U.S. District Court in connection with his guilty plea to these five counts.⁸ Inasmuch as appellant was found guilty of violating 18 U.S.C. § 1341 during the effective period of § 102 of Pub. L. No. 103-112 and the Office properly followed its procedures, including presenting the proper documents and proofs, the Board finds that the Office properly terminated appellant's compensation effective May 12, 1994

² The Office also determined that appellant should repay the overpayment in one payment. As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the manner of repayment. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

³ *William A. Kandel*, 43 ECAB 1011, 1020 (1992).

⁴ Public Law No. 103-333, enacted on September 30, 1994, amended the Act by adding a new section, 5 U.S.C. § 8148, which provides for (a) the termination of benefits payable to beneficiaries who have been convicted of defrauding the program, and (b) the suspension of benefits payable to beneficiaries imprisoned as a result of felony conviction. Public Law No. 103-112 requires termination of all benefits, including those for dependents; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (March 1997).

⁵ *Id.*; Chapter 2.1400.12d.

⁶ *Id.*; Chapter 2.1400.12e(1).

⁷ *Id.*; Chapter 2.1400.12f(2).

⁸ Appellant has suggested that his compensation should not be terminated because he was not advised that he would not be entitled to compensation if he pled guilty to violating 18 U.S.C. § 1341. The Board notes, however, that the Act contains no provision that a person who pleads guilty to fraudulently obtaining Office benefits must be advised that such a plea might lead to termination of his or her compensation benefits.

and properly determined that he was not entitled to \$12,983.04 in compensation for the period May 12 to November 12, 1994.⁹

The Board finds that appellant received a \$12,983.04 overpayment of compensation for the period May 12 to November 12, 1994.

Appellant received compensation for the period May 12 to November 12, 1994 despite the fact that he was not entitled to compensation for this period. As noted above, the record contains evidence, which shows that appellant received \$12,983.04 in compensation for this period, which he was not entitled to receive. Therefore, the Office properly determined that appellant received a \$12,983.04 overpayment.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁰ The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹¹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

⁹ The record contains documents which show that the Office properly calculated the amount of the overpayment. During the period May 12 to November 12, 1994, a period of 185 days, appellant received \$1,965.00 in compensation every 28 days.

¹⁰ 5 U.S.C. § 8129(a).

¹¹ 5 U.S.C. § 8129(b).

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.320(b) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact, which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information, which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect.”¹²

In this case, the Office apparently applied the third standard in determining that appellant was at fault in creating the overpayment. Appellant knew or should have known that he was not entitled to receive compensation after pleading guilty to five counts of mail fraud in connection with his compensation claim under 18 U.S.C. § 1341.¹³ Appellant continued to accept compensation benefits after the May 12, 1994 imposition of judgment through November 12, 1994. Therefore, appellant was at fault in creation of the \$12,983.04 overpayment such that it was not subject to waiver.

The decision of the Office of Workers’ Compensation Programs dated July 13, 1998 is affirmed.

Dated, Washington, D.C.
March 22, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹² 20 C.F.R. § 10.320(b).

¹³ Appellant pled guilty to the five counts on February 3, 1994, and the judgment was imposed on May 12, 1994.